IN THE SUPREME COURT OF IOWA
CASE NO. 16-0076

BOARD OF WATER WORKS TRUSTEES OF THE CITY OF DES MOINES, IOWA,

Plaintiff-Appellant,

vs.

SAC COUNTY BOARD OF SUPER-VISORS AS TRUSTEES OF DRAINAGE DISTRICTS 32, 42, 65, 79, 81, 83, 86, and CALHOUN COUNTY BOARD OF SUPERVISORS and SAC COUNTY BOARD OF SUPERVISORS AS JOINT TRUSTEES OF DRAINAGE DISTRICTS 2 AND 51 and BUENA VISTA COUNTY BOARD OF SUPERVISORS and SAC COUNTY BOARD OF SUPERVISORS AS JOINT TRUSTEES OF DRAINAGE DISTRICTS 19 AND 26 and DRAINAGE DISTRICTS 64 and 105,

Defendant-Appellees.

AMICUS CURIAE BRIEF OF THE IOWA DRAINAGE DISTRICT ASSOCIATION REGARDING CERTIFYING QUESTIONS TO THE SUPREME COURT OF IOWA FROM THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA WESTERN DIVISION

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Statement of Identity Amicus Curiae of Iowa Drainage District Association and Its Interest

The Iowa Drainage District Association ("IDDA") is a non-profit corporation organized under the laws of the State of Iowa in 1990. Its mission is to educate officials, legislators and the public in regard to issues facing drainage districts. The IDDA is a voice for more than 3,500-member drainage districts in Iowa. The named Defendant counties and drainage districts are all members of IDDA. The IDDA desires to present to Iowans the entire picture as to the feasibility of proposed legislation on the uniqueness of drainage areas.

As stated in its By-Laws, "[i]t is the purpose of the Iowa Drainage District Association to promote the benefits of drainage districts and levee districts and to safeguard the rights and privileges

of established districts and levee districts as provided by the Code of Iowa." The IDDA can uniquely contribute to the Supreme Court's knowledge and bases in answering the certified questions from the Northern District by its history of advocating for and representing drainage districts in Iowa.

ARGUMENT: DRAINAGE DISTRICTS HAVE ABSOLUTE IMMUNITY TO SUIT UNDER IOWA LAW

I. Introduction

The Complaint in the District Court for the Northern District of Iowa asserts claims against the Sac County Board of Supervisors as trustees of Drainage Districts 32, 42, 65, 79, 81, 83 and 86; and against Calhoun County Board of Supervisors as joint trustees of Drainage Districts 2 and 51; and Buena Vista County Board of Supervisors and Sac County Board of Supervisors as joint trustees of Drainage Districts 64 and 105.

The lawsuit alleges a detrimental impact of the activities of the Drainage Districts on the sources of water relied upon by the Des Moines Water Works. (Complaint paragraph 4). In fact, the Plaintiff, Des Moines Water Works, asserts that a major source of nitrate

pollution in the Raccoon River watershed is the "drainage system infrastructure, such as those created, managed, maintained, owned and operated by the Drainage Districts…" (Complaint, paragraph 10)

The Plaintiff has acknowledged that the Iowa Supreme Court has recently held that a drainage district is exempt from suit in tort and for money damages, *Chicago Cent. & Pacific R. Co. v. Calhoun County Board of Supervisors,* 816 NW2d 367 (Iowa 2012), but nevertheless the Plaintiff asserts that the exemption either does not apply or, if applicable, would deprive the Des Moines Water Works of due process and/or equal protection. (Complaint, paragraph 31).

The Plaintiff further asserts that the discharges by the Drainage Districts containing high nitrate concentrations is a permanent invasion of the Des Moines Water Works. (Complaint, paragraph 155, 157).

According to the Plaintiffs, there are approximately 3,000 drainage districts paralleling the Raccoon and Des Moines River watersheds. (Complaint, paragraph 108).

The questions certified to the Iowa Supreme Court by the Northern District directly address the doctrine of implied immunity

of drainage districts and require the Supreme Court to rule as to whether the immunity doctrine grants unqualified immunity from damage claims, from equitable remedies, or whether the Plaintiff may assert protections under the Iowa Constitution.

Because the Supreme Court's ruling on these questions will have broad impact on potentially thousands of drainage districts throughout Iowa and how they operate, the Iowa Drainage District Association submits the following arguments as contributions to the Supreme Court's edification on these matters.

The Iowa Drainage District Association addresses herein solely the arguments contained in amicus curiae brief of the Environmental Law and Policy Center (ELPC).

It is the position of IDDA that ELPC is asking the Court to engage in unwarranted judicial activism and to ignore the Iowa Constitution, the Iowa Code and seventy years of Supreme Court authority.

II. ELPC's Argument for Accountability of Drainage Districts is Flawed for Lack of Authority

ELPC's first argument is simply flawed by its stated intent. That the question before the Court is whether the "unqualified immunity for drainage districts may be rebutted under the facts of this case." (emphasis added) (Brief, p. 5) That is to say, given the law that governs drainage districts, ELPC argues that "the facts" as they present them suggest the law should be changed, that the immunity provided to drainage districts in the Iowa Constitution and seventy years of Iowa Supreme Court decisions should be abrogated based not on a citation to any law, but rather on the claimed circumstances to which the law is applied.

ELPC's argument is simple and unencumbered by support of any Iowa law. ELPC claims the immunity of drainage districts is based upon a presumption that drainage is a public benefit, (Brief, p.5), but argues that

> --there has never been a drainage district case addressing immunity in the context of pollution; (Brief, p.5)
>
> --and drainage districts argue for an "unqualified right to pollute;" (Brief, p.6)
>
> --drainage district immunity removes any incentive to curb nutrient pollution; (Brief, p. 6)

--drainage districts "dump significant amounts of nutrient pollution into Iowa waters." (Brief, p. 6)

ELPC goes on to assert that the consequences of the alleged nutrient pollution are public health problems. ELPC outlines the provision of the federal Safe Drinking Water Act, 42 USC §§300f, et seq. and the difficulties of the Des Moines Water Works and smaller communities to provide safe drinking water to their customers in compliance with federal law. (Brief, pp. 7-8). ELPC further asserts that nutrient pollution causes "algal blooms in rivers and lakes" that threaten the health of swimmers and children and pets, requiring the DNR to monitor state park beaches in the summer. (Brief, pp. 8-10)

ELPC concludes the litany of ills by stating that "Iowa is experiencing significant consequences to public health and welfare from uncontrolled nutrient pollution." (Brief, p. 10) and then argues that drainage district law requires the consideration of public health and welfare. (Brief, p. 11)

The immunity of the drainage districts has more authoritative heft than merely being a presumption that drainage is a public

benefit, as acknowledged by ELPC (Brief, p. 5), it is a presumption specifically enshrined in Iowa law:

> [t]he drainage of surface waters from agricultural lands and all other lands, including state-owned lakes and wetlands, or the protection of such lands from overflow shall be presumed to be a public benefit and conducive to the public health convenience and welfare.

§468.2(1) Code of Iowa. What drainage districts do and are authorized to do ("to straighten, widen, deepen, or change any national water course…" (§468.1) and to drain surface waters (§468.1(1)), is already found to be a public benefit, conducive to public health under the law, which ELPC purportedly wants.

What ELPC requests as a consequence of its argument is there be "some accountability for the consequences of pollution." (Brief, p. 11) Presumably, that accountability must adhere to the drainage districts.

The argument is flawed no matter what consequences result from or who may have contributed to nitrate pollution. There is no legal bridge, no nexus, for the Court to spring-board from alleged consequences of the work of drainage districts to an interpretation of the Code attributing "accountability" to drainage districts.

Significantly, ELPC provides no authority under Iowa law for its argument that implicitly would require the Court to rule that constitutionally-sanctioned, legislatively-based and judicially approved actions of drainage districts are illegal. Such a ruling would be unsupportable under Iowa law.

ELPC's position that "unqualified immunity for drainage districts may be rebutted under the facts of this case" (Brief, p. 5) has already been soundly and unequivocally overruled by *Fisher v. Dallas County,* 369 NW2d 426, 429, 430 (Iowa 1985): "a drainage district could not be subject to a money judgment in tort under any state of facts." (emphasis added)

III. The Immunity of Drainage Districts is Absolute and Should be Unchanged Under the Doctrine of Stare Decisis

ELPC's second argument is a gross and disingenuous mischaracterization of the drainage district law in Iowa and the drainage districts' defense of that law. The entire argument can be accurately paraphrased as:

> --the drainage districts read the law as a license to pollute the water; (Brief, p. 13)

--there is no implicit authority in the law allowing water pollution; (Brief, p. 13)

--the Iowa Legislature could not have intended the law to account for the use of nitrogen fertilizer. (Brief, p.15)

ELPC goes on to request the Court, as a consequence of the argued anachronistic immunity of drainage districts, to allow the DMWW the opportunity to rebut that immunity (Brief, p. 17).

The argument is a mischaracterization of the law because throughout ELPC asserts a lack of authority in the statute as tantamount to and equivalent of a prohibition in the statute. That is, ELPC creates a fictitious prohibition ("Defendants remarkably read the drainage district law as a license to pollute in unlimited quantities, but the drainage district law provides no such authorization." (Brief, pp. 11-12)). The implication is that the drainage districts are violating the statute, although the supposed prohibition being violated is a complete chimera or, in other words, a phantom prohibition. Drainage districts were founded to drain water for the benefit of the public (§468.1, Code of Iowa); that is what drainage districts do. The Legislature evidently anticipated attempts to narrow and constrict the work of drainage districts, as it

emphasized that drainage-district law must be liberally construed to effect its purpose:

> The provisions of this subchapter and all other laws for the drainage and protection from overflow of agricultural or overflow lands shall be liberally construed to promote levying, ditching, draining, and reclamation of wet, swampy and overflow lands.

§468.2(2) Code of Iowa

The centerpiece foundation of ELPC's argument is "[n]othing in the code section laying out the jurisdiction of drainage districts or the construction of the drainage district statute explicitly provides any license to pollute the water." (emphasis added) (Brief, p. 13) That is an unassailable, yet meaningless, proposition. It simply cannot in any reasonable manner be construed to set criteria for the exercise of the legislatively–created authority of drainage districts. Just because a statute does not explicitly authorize an action does not mean that to do such an action would be a violation of the statute. To so argue is to commit a fallacy of negative inference.

Furthermore, the argument is disingenuous in that it repeatedly imputes a bad motive to the drainage districts: "a license to pollute unlimited quantities" (Brief, p. 12); "any license to pollute the water"

(Brief, p. 13); "there is no public health or welfare consequence severe enough to limit their right to pollute" (Brief, p. 14); "to create an unqualified right to pollute" (Brief, p. 1`7). Of course, no such imputation is permissible; and such a false imputation as a premise further undermines the credibility of ELPC's argument.

The statute authorizing the establishment and operation of drainage districts is clear and unclouded. § 468.1 authorizes a board of supervisors to establish a drainage district at landowners' behest and to construct levees, ditches, drains and to widen, deepen or change any water course, whenever to do so would be conducive to the public health, convenience or welfare. § 468.2 explicitly provides the drainage of surface water or the protection of lands from overflow "shall be presumed to be a public benefit and conducive to the public health, convenience, and welfare." See also Article I, §18, Iowa Constitution.

What could be clearer than this legislatively-based finding of public benefit to the work of drainage districts? The Code makes the public benefit a finding, a legislatively-authorized fact; § 468.2(1) provides for a "presumption." The Supreme Court has long upheld

the presumption that drainage of surface waters is presumed to be a public benefit. *State v. Des Moines County,* 149 NW2d 288, 291 (Iowa 1967) ("In fact the drainage of surface waters from agricultural and other lands or their protection from overflow is presumed to be a public benefit and conducive to the public health and welfare.") (emphasis added) See also *Prichard v. Woodbury County,* 150 Iowa 565, 580 (Iowa 1911) ("The board's finding that the plan as established will drain surface waters from the agricultural lands within the district having support in the evidence, we must assume that this is a public benefit and conducive to public health, utility and welfare.") (emphasis added)

ELPC offers no authority for its argument.

Yet, the legal authority granting immunity from suit to drainage districts has been iterated and reiterated by the Iowa Supreme Court. Drainage districts are immune from suit:

> The drainage district's immunity from suit in tort does not stand or fall with the doctrine of sovereign immunity, but is based upon the special and limited powers and duties conferred by the Iowa Constitution and statutes.

Gard v. Little Sioux Intercounty Drainage District of Monona, 521 NW2d 656, 698 (Iowa 1994). See also *Fisher Id.* ("Our cases have consistently held that a drainage district is not susceptible to suit for money damages. It has no corporate existence for that purpose.") See also *Chicago Cent. & Pacific R. Co. v. Calhoun County Board of Supervisors,* 816 NW2d 367, 374 (Iowa 2012) ("The special and limited powers of a district mean that a drainage district can only be sued to compel, complete, or correct the performance of the board or the district.") See also *Holler v. Board of Supervisors,* 304 NW2d 441, 442 (Iowa Ct. App. 1980) (Iowa Code chapter 455 [predecessor of Ch. 468] makes no provision for liability of drainage district for injuries to property resulting from performance of its statutory duties; landowners therefore, could not sue for damages caused by flood resulting from maintenance of drainage system.)

The immunity granted to drainage districts is necessarily absolute based upon the nature of drainage districts. They have no corporate existence for the purpose of suit. *Fisher, Id.* at 429, and with no corporate existence for suit ("a drainage district is merely an area of land, not an entity subject to judgment for tort damages." *Fisher, Id.*

at 430), the notion of a partial or limited immunity has no viability. A limit on immunity would imply an area of liability for which there would be no opportunity to enforce because there is no corporate entity susceptible of suit.

The Supreme Court has repeatedly ruled that drainage districts have no legal life except as found in their statutory creation. *Board of Trustees of Monona Harrison Drainage District No. 1 v. Board of Supervisors of Monona County,* 232 Iowa 1098, 1100 (Iowa 1942) ("Appellee [Drainage District No. 1] is a legislative creation which has no rights or powers other than those found in the statutes which gave and sustain its life."); *Mitchell County v. Odden,* 219 Iowa 793, 801 (Iowa 1935) ("We also hold in the Worth County case, supra, that a drainage district is sui generis. It is not a corporation, and cannot be sued. It can incur no corporate liability."); *Houghton v. Bonnicksen,* 212 Iowa 902, 905 (Iowa 1931) ("A drainage district is not a legal entity and cannot be sued.")

In *Chicago, Id* at 374, the Supreme Court noted that the only remedy for a drainage district's failure to perform its statutory duty is a mandamus action, and further

> [t]he legislature has not responded to our interpretation of this aspect of the drainage district statutes, indicating its tacit acceptance of mandamus as the appropriate remedy for board inaction.

Issues of statutory interpretation settled by the Court and not disturbed by the Legislature have become tacitly accepted by the Legislature. *Gard, Id* at 698. Thereafter the Court applies the doctrine of stare decisis. *Cover v. Craemer,* 137 NW2d 595, 599 (Iowa 1965).

Stare decisis is a "reverable doctrine" which requires "the highest possible showing that a precedent should be overruled before taking such a step." *McElroy v. State,* 703 NW2d 385, 394 (Iowa 2005).

> We do not overturn our precedents lightly and will not do so absent a showing the prior decision was clearly erroneous.

McElroy, Id at 694.

There has been no showing whatever, not to say a highest possible showing, by ELPC that the rulings of the Supreme Court as to absolute immunity of drainage districts was erroneous.

IV. The Immunity of Drainage Districts is a Political Question for the Legislature, Not a Judicial Question

The Iowa Legislature has the power to amend Chapter 468 to allow for limits on absolute immunity. It is a political question for

the Legislature, not a judicial question for the Court. The Legislature could readily abjure its tacit acceptance of the rulings of *Fisher, Chicago,* and *Gard.* The Legislature is the appropriate forum for political matters.

> It is a firmly-established principle that when a challenge to a legislative action involves a "political question," the judiciary may not intervene or attempt to adjudicate the matter…This principle stems primarily from the separation of powers doctrine which requires we leave intact the respective roles and regions of independence of the coordinate branches of government.

Des Moines Register and Tribune Co. v. Dwyer, 542 NW2d 491, 495 (Iowa 1996).

Justice Felix Frankfurter articulated the need for self-imposed judicial discipline:

> A judge must not rewrite a statute, neither to enlarge nor contract it whatever temptation this statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation."

F. Frankfurter, "Some Reflection on the Reading of Statutes," 47 Colum. L. Rev. 527, 533 (1947).

The Court has articulated six factors, one or more of which demonstrates the existence of a political question. Two of the factors undeniably demonstrate the existence of a political question.

> --a lack of judicially discoverable and manageable standard for resolving the issue;
>
> --the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion;

Des Moines Register, Id. at 495.

ELPC has asserted that drainage districts, by simply performing their constitutionally-sanctioned and legislatively-ordained tasks, should be held accountable of the consequences of pollution. (Brief, p. 11)

It would appear beyond doubt that the myriad of premises and fact-determination that must necessarily contribute to a far-reaching policy decision such as urged by ELPC are not in the purview of the Supreme Court. The questions before the Court are impossible to decide without the Legislature's setting a different policy for drainage districts.

CONCLUSION

IDDA requests the Court to answer the Certified Questions as follows:

1. As a matter of law, the doctrine of implied immunity of drainage districts does grant drainage districts unqualified immunity from all the damage claims set forth in the Complaint.

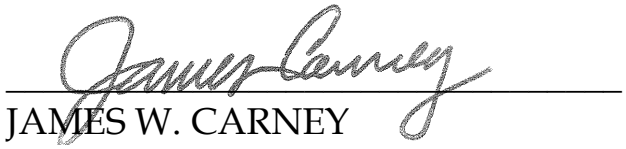
2. As a matter of law, the doctrine of implied immunity does grant drainage districts unqualified immunity form equitable remedies and claims, other than mandamus.

3. As a matter of law, the Plaintiff may not assert protection afforded by the Iowa Constitution's Inalienable Rights, Due Process, Equal Protection and Takings Clauses against drainage districts as alleged in the Complaint.

4. As a matter of law, the Plaintiff does not have a property interest that may be the subject of a claim under the Iowa Constitution's Takings Clause or as alleged in the Complaint.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on March 23, 2016, I electronically filed this document with the Supreme Court Clerk using the EDMS system, which will serve it on the appropriate parties electronically.



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CERTIFICATE OF COMPLIANCE

1. The Amicus Curiae Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(*g*)(1) or (2) because this brief contains 3,054 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(*e*) and the type-style requirements of Iowa R. App. P. 6.903(1)(*f*) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Font Size 14 Book Antiqua.

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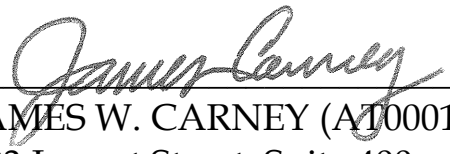

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